No. 8130

United States
Circuit Court of Appeals
For the Ninth Circuit.

INLAND POWER AND LIGHT COMPANY,
a corporation,

Appellant,

vs.

FAY M. GRIEGER and MARY LOIS GRIEGER,

Appellees.

Appellant's Petition for Rehearing

ROBERT E. EVANS,
1205 Rust Bldg.,
Tacoma, Washington.

LAING & GRAY,
John A. Laing,
Henry S. Gray,
1504 Public Service Bldg.,
Portland, Oregon,
Attorneys for Appellant.

SWEENEY, STRAUB & DIMM, PRINTERS, PORTLAND, ORE.

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To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

In its briefs filed with this Honorable Court appellant endeavored to present in all necessary detail its analysis of the facts, and to state those principles of law which, it was convinced, should control. Certain of the findings and principles set out in the majority and dissenting opinions indicate, however, that appellant's position was not made clear. Appellant respectfully requests, therefore, that it be given opportunity to restate its position, with particular regard to the principles relied upon in the majority opinion, and that this Honorable Court reconsider its judgment and the principles advanced in support thereof.

I

The Principle of Concurring Causes Laid Down in the Majority Opinion Should Not Be the Law of the Case.

In the majority opinion it is stated that on December 21, 1933, the erosion taking place on appellees' lands was caused wholly by natural conditions, that on December 22nd the erosion was caused by two concurrent causes, a combination of natural conditions and human agency. There are, consequently, two periods during which damage was occurring to appellees' lands by flood waters: first, the period prior to the release by appellant of impounded waters; and second, the period subsequent to such release.

Despite such findings, the majority opinion lays down the principle of concurring causes as the rule of the case, and finds in that principle justification for the affirmance of the judgment of the district court. With all respect, appellant contends that that principle should not control; and in support of this contention now proposes to analyze the reasoning of the majority opinion with particular regard to the admitted facts of the case.

A. The Principle of Concurring Causes Cannot Apply With Respect to the Injury Suffered by Appellees' Lands Prior to the Release of Impounded Waters by Appellant.

The effect of the majority opinion, appellant contends, is to make appellant liable for *all* erosion which

damaged the appellees' lands. As stated above, the facts are (and the majority opinion so admits) that flooding and erosion took place prior to the release of impounded waters. The resulting damage was in no way attributable to appellant, but solely to unprecedented and unforseeable flood conditions, an act of God, as admitted in the majority opinion. If appellant's dam had never been raised, the lands of the appellees would have been eroded by the natural flood flow of the stream; in fact, *at all times prior to the release of impounded waters the appellees' lands were being subjected to less than the natural flood flow.*

It is fundamental law that a person can be held liable for an injury only if his negligent act was a proximate cause of such injury. This principle ought to require no citation of authority. The following quotation, taken from Shearman & Redfield on Negligence (6th ed., Vol. 1, Sec. 26, p. 48) states the general rule of proximate causation:

> "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred."

The case of *The Memphis and Charleston Railroad Company v. Reeves,* 10 Wall. 176, 189; 19 L. ed. 909, 913 (cited in the dissenting opinion) illustrates the application of this principle. In that case the act of the carrier, sought to be charged for injury to plaintiff's tobacco, was held to be a remote cause—the flood, an

act of God, the proximate cause. At the trial the following instruction was requested but not given:

> "When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case."

In discussing this instruction, the Supreme Court said:

> "It is hard to see how the soundness of this proposition can be made clearer than by its bare statement. A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused.
>
> "What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it."

In view of the foregoing it is difficult to understand why the majority opinion should *assume* but not *decide* the soundness of the principle that a person is not liable

for damage caused by an act of God, particularly when that opinion concedes as true that "the evidence shows some damage by the act of God prior to the time when appellant's negligent act concurred", and that the proof does disclose that "erosion occurred prior to that time". The result of the refusal of the majority to apply this established principle of causation, coupled with the failure of the majority to compel the appellees to demonstrate what part of the damage resulting to their lands was attributable to appellant's act, is that appellant is held liable for all injury to appellees resulting from the flood flow of the stream.

This result cannot be justified through the application of the doctrine of concurring causes. That doctrine can have no possible application to the injury which occurred prior to the release of impounded waters. During that first period there was only one cause—an act of God. The majority opinion, at page 9, concedes this. It follows, therefore, that on no sound principle of law or justice can appellant be held responsible for damages resulting from such cause, since, having been entirely free from any connection with the chain of causation resulting in such damage, appellant was not a cause in fact, much less a proximate cause thereof.

Appellant further contends, however, that even if its act in releasing the impounded waters concurred with the act of God in producing the injury complained of, nevertheless appellant can be held liable, if at all, for only that part of such injury directly resulting from and attributable to such negligent act.

B. The Principle of Concurring Causes Cannot be Invoked to Hold Appellant Liable for Any Injury Not Directly Attributable to Appellant's Alleged Negligent Act.

In discussing this point, appellant will first analyze the principle as applied in the majority opinion and the cases relied upon therein, and will then discuss those principles which, appellant contends, should control.

On page 9 of the majority opinion the following appears: "Thus it is apparent that water, from natural causes, and water negligently discharged by appellant, eroded appellees' property causing damage. The two causes were concurrent." And on page 10 the majority opinion, after setting out, in part, the general rule as stated in Corpus Juris continues: "One specific application [of the general rule] is where damage is the result of two concurring causes, one of which is the negligence of defendant and the other, the negligence of a third person, 'the defendant is liable to the same extent as though it had been caused by his negligence alone'." To this proposition a number of cases are cited, the first being *Miller v. Union Pacific R. Co.*, 290 U. S. 227, 78 L. ed. 285 (1933). The facts of that case are doubtless well fixed in the mind of the court. In essence the case is one where the two concurring negligent acts combined to produce a result *which would never have taken place in the absence of either.* As the Supreme Court said—"Instead of a remote cause and a separate intervening, self-sufficient, proximate cause, we have here concurrent acts, co-operating to produce the result." These concurring causes were characterized by the court as "two inseparable negligent acts which, uniting to

produce the result, constituted mutually contributing acts of negligence on the part of the railroad company and the driver of the automobile". The court added—"The result, therefore, is that the contributory negligence of the driver did not interrupt the sequence of events set in motion by the negligence of the railroad company or insulate them from the accident, but concurred therewith *so as to constitute in point of time and in effect what was essentially one transaction.*" (Italics added.)

Thus, the *ratio decidendi* of the case is that each of the two negligent acts complained of was a contributing cause without which no injury could have resulted. The act on which the plaintiff in that case sought to predicate liability was a *causa sine qua non* of the result. In all of the cases cited and relied upon in the majority opinion the negligent act complained of was such a cause, operating proximately in conjunction with another cause to produce the injury. In the interest of brevity appellant will not attempt an analysis of each of those cases, although appellant might justifiably argue that certain of them do not relate to the principle of concurring causes. In each of the cases relating to that principle the person sought to be charged in full for the injury resulting from the concurring causes was a *causa sine qua non,* and thus an active, proximate and indispensable cause of such injury. In the *Grand Trunk Ry. Case* [1] the negligent acts producing the injury constituted one transaction in point of time and in effect. In the

(1) Grand Trunk Railway Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266 (1883);

Deserant Case [2] and in the *Wilmington Star Mining Co. Case* [3] the negligent act of the defendant was a cause without which the explosion could never have happened. In the *Gila Valley Ry. Co. Case* [4] and the *Kreigh Case* [5] the accident could not have occurred if the defendant had maintained safe working conditions for employees. *The Salton Sea Cases* [6] went off on the ground that floods of the Colorado River would never have reached the Salton Sink if the defendant's ditches had never been opened or if they had been properly maintained. In the *American Coal Co. Case* [7] death would not have come to the deceased if the defendant had not blocked a watercourse with a refuse pile. The child in the *Howe Case* [8] would never have been killed by the log if defendant had not left it in the path of the landslide. And in the *Grant Case* [9] the force of the lightning would never have reached the girl's body if the defendant had not strung wires from the tree to the tent.

It is clear that in all the cases just cited the damage complained of could never have happened without the defendant's contributing act, and that such act was essential to the result of the concurring causes. The appellant contends, therefore, that this line of cases and

(2) Deserant v. Cerillos Coal Railroad Co., 178 U. S. 409, 44 L. ed. 1127 (1899);
(3) Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708 (1906);
(4) Gila Valley, G. & N. Ry. Co. v. Lyon, 203 U. S. 465, 51 L. ed. 276 (1906);
(5) Kreigh v. Westinghouse, C. K. & Co., 214 U. S. 249, 53 L. ed. 984 (1908);
(6) Salton Sea Cases, The, 172 Fed. 792 (C. C. A.—9th—1909);
(7) American Coal Co. v. De Wese, 30 F. (2d) 349 (C. C. A.—4th—1929);
(8) Howe v. West Seattle Land & Improvement Co. et al., 21 Wash. 594, 59 Pac. 495 (1899);
(9) Grant v. Libby, McNeill & Libby, 160 Wash. 138, 295 Pac. 139 (1931).

the principle to which they are cited can have no proper application to the facts of the present case. In those cases the injury could be traced only to the combination of causes; in the case in issue part of the injury can be traced directly to but one of the concurring causes—the act of God. The majority opinion admits injury caused by the natural flood flow of the stream both before and after the release of the impounded waters.

The majority opinion further asserts that the rule of concurring causes is no different when such causes are an act of God and the negligent act of the defendant. This assertion is true only in a limited sense. If, as in certain of the cases cited in the majority opinion, the negligent act of the defendant makes operative the other concurring cause, the act of God, so that injury results which would not have occurred without such negligent act, the defendant will be held liable for all damage. Beyond this point the doctrine cannot be extended. And it can have no application to a case where the damage complained of results partly from an act of God and partly from the negligent act of the defendant. Under such circumstances the doctrine of joint tort-feasors does not apply. The following quotation from a well reasoned article entitled "Multiple Causation and Damage" by Chief Justice Peaslee of the Supreme Court of New Hampshire (47 Harvard Law Review 1127, 1131) is illustrative:

> "Where both are tortfeasors, the rule that each is liable for the result the two caused gives a full recovery from either. But if one cause is innocent, the wrongdoer is merely answerable for his own

wrong and its results. In the latter case he escapes liability for the damage resultant from the innocent cause since neither he nor anyone for the results of whose wrong the law makes him answerable has done the injury. The ground upon which the joint tortfeasor is held for all the damage does not exist where one of the causes is innocent."

The following cases stand for the proposition stated above:

In *Law v. Gulf States Steel Co.,* 229 Ala. 305, 310, 156 So. 835, 839 (1934), involving an action for flooding of plaintiff's land through the operation of a dam by the defendant, the court said:

"Appellants contend that if these obstructions or any of them contributed to the injury to the crops, defendant would be liable for the entire injury, although without them there would have been injury by floods, or even the act of God. *This contention seeks to apply the doctrine of joint tortfeasors.* (Italics added.)

"The case of Welch v. Evans Bros. Construction Co., 189 Ala. 548, 66 So. 517, is relied upon. That case involved damages to stock of merchandise from the negligence of a construction company in leaving open a hole in the roof over night. A rain came and damaged the goods. The case does deal with the injury as caused by the concurrent negligence of defendant and an act of God. This term is obviously used in the sense of a natural recurrence of nature against which defendant could have and should have guarded, and the entire injury been avoided.

"It is no authority for holding one liable for the proximate consequence of something over which he had no control, and which would have occurred if the wrong charged to him had never been done.

"The action is not analogous to a case of joint tort-feasors, wherein each concurs in creating dangerous conditions without which no injury would have occurred.

"We hold that, if injury to these crops would have resulted regardless of any construction work of this defendant, whether from customary or extraordinary floods, the defendant is not liable therefor; but its liability, in such case, is limited to such increased injury, if any, as proximately resulted from such obstructions, and does not include injuries which would have occurred had no obstructions been made."

In *Pfannebecker v. Chicago, R. I. & P. Ry. Co.*, 208 Ia. 752, 755; 226 N. W. 161, 162 (1929), involving an action for the flooding of plaintiff's lands by reason of an embankment erected by defendant which caused flood waters to back up and damage such lands, the court held that there was liability only for damage resulting from defendant's negligence, and not for damage resulting from flood conditions, saying:

"This being true, appellee could not succeed, for he is entitled to recovery within the instructions, if at all, only for the injury caused by the alleged obstructions. If, then, part of the loss was due to the overflow of German creek, appellee can only obtain from appellant the additional or added damages for the crop, pasture, and hay land destruction resulting from the backwater."

In *McAdams v. Chicago, R. I. & P. Ry. Co.*, 200 Ia. 732, 734, 735; 205 N. W. 310, 311, 312 (1925), the court said:

"All parties concede that, even if the rocks had not been so placed, the crops would have been dam-

aged by overflow; and it is conceded, or at least is the law, as stated in the instructions, that the defendant could only be liable, in any event, for the additional damage caused to said crop by reason of the placing of said rocks about the bridge and trestle. * * *

"Plaintiff cannot charge against the defendant company the damage to the crop by the flood which was not caused by the alleged negligent acts of the defendant."

To the same effect are:

Ft. Worth Ry. Co. v. Speer, 212 S. W. 762 (Tex. Civ. App., 1919).

Chicago R. I. & G. Ry. Co. v. Martin, 37 S. W. (2d) 207 (Tex. Civ. App., 1931).

Sherwood v. St. Louis S. W. Ry. Co., 187 S. W. 260 (Mo. App., 1916).

The proposition under discussion finds further support in the case of *Radburn v. Fir Tree Lumber Company* (83 Wash. 643, 145 Pac. 632), cited and relied upon in appellant's brief (p. 90). In the majority opinion it was said that if that case reached a result different than that reached in the cases cited in the opinion in support of the principle of concurring causes, then the *Radburn Case* must be considered as overruled by the case of *Grant v. Libby, McNeil & Libby* (160 Wash. 138, 295 Pac. 139—a later Washington decision in which the *Radburn Case* was neither referred to nor cited). With all respect, appellant submits that this conclusion of the majority opinion is without justification.

The two cases may be readily distinguished. In the *Radburn Case* the damage complained of was the direct result of two causes: first, the unusual rainfall; and second, an increase in flood waters backed up by the defendant's dam. The injury attributable to the first cause would have resulted if the defendant had not maintained its dam. In the *Grant Case,* however, the death of the girl could not have been caused by the lightning bolt if the defendant had not strung wires (negligently, it was alleged) from the tree, later struck by the bolt, to the tent occupied by the girl. Without the human intervention of the defendant the force of the lightning bolt would have been expended at the point of striking and could not have reached the girl's body. In other words, the defendant's act was a *causa sine qua non* of the result—the death of the girl.

In the present case appellant's act was not such a cause. The following hypothetical situation may serve to emphasize the distinction appellant contends for in its discussion of the principle laid down in the majority opinion.

A plaintiff's lands are on a watercourse below the confluence of the main stream and a small tributary. On such tributary the defendant maintains a dam. Because of unusual rains the stream and tributary became swollen with flood waters. The defendant impounds part of the water of the tributary, releasing less than the natural flood flow. The plaintiff's lands are flooded and eroded. At the height of the flood the plaintiff opens his gate and releases some impounded water in addition to the concurrent natural flood flow. Such additional

water is measured and found to be but a small part of the total volume of water in the main stream after the gate was opened. It is obvious that on no theory of law can the defendant be held liable for the damage which took place prior to his opening of his gate, and that if defendant can be held liable for any damage such liability must be confined to that damage directly resulting from the release of the water discharged in excess of the natural flood flow of the stream over the plaintiff's lands. In the present case it is immaterial that all of the waters which flooded the appellees' land passed appellant's dam.

Appellant further contends, however, that it is not liable in damages for the discharge of the small quantity of water which, it admits, was in excess of the natural flood flow.

II

There is no Substantial Evidence in the Record From Which the Jury Could Have Reasonably Determined Within the Rules of Liability Any Damage Attributable to Appellant's Negligence.

Appellant's liability cannot be made out by establishing its negligence alone. In addition, appellees must have established by competent evidence that the negligence complained of resulted in substantial damage.

The only testimony contained in the record, with respect to the probable character and effect of the negligence of appellant in discharging the additional volume of water into the swollen river, was that of engineer

Roberts. The majority opinion briefly summarized his testimony as follows:

> "Engineer Roberts testified that the increase over the natural flow on December 22nd, was approximately 6 per cent, which would be about 6800 second feet; that if water was on the Grieger land to a depth of six feet, this additional discharge would raise the water on the Grieger place 'a little over 4 inches;' that the mean discharge of 114,000 second feet 'would have sufficient force to be a competent force to cut away land, with the velocity that the stream has;' that the drop in the elevation of the impounded waters 'would have some effect on Mr. Grieger's land'."

To establish liability it is not sufficient that the water so discharged by appellant would have *"some effect"* upon appellees' lands; such discharge must have had a *substantial* effect before it may be regarded as a factor in the chain of causation. As stated in Section 431 of the Restatement of the Law of Torts:

> "The negligence must also be a substantial factor as well as an actual factor in bringing about the plaintiff's harm. The word 'substantial' is used to denote the fact that the defendant's conduct has such effect in producing the harm as to lead reasonable men to regard it as a cause * * *."

See also, *Gully v. First National Bank,* ..... U. S. ....., 81 L. ed. 44, 48 (1936), where it was said:

> "One could carry the search for causes backward, almost without end. (Citing cases.) Instead, there has been a selective process which picks the *substantial* causes out of the web and lays the other ones aside." (Italics added.)

In a later portion of the same paragraph in which engineer Roberts stated that the discharge of impounded water by appellant would have "some effect", he further admitted that without a more detailed computation regarding the conditions and character of the channel at the time such discharge was made he would be unable to know anything about the effect of such waters upon the appellees' lands.

> "As to whether I would be able to testify with any degree of accuracy at all without having possession of those figures, as to how much water it would take to overflow the banks, or to wash away Mr. Grieger's land—you couldn't do it without some computation that covered the question you asked: *in fact, I wouldn't know anything about it at all without those figures.*" (Tr. 196-197.) (Italics added.)

Any amount of water, however small, discharged into the stream might conceivably have had "some effect"; but additional evidence should have been produced before any jury could properly have found that appellant's action was sufficient to constitute the *substantial* effect required by the rules of causation. If, until additional facts and figures were given him, an experienced hydraulic engineer could give no estimate other than a mere surmise that the additional volume of water discharged into the river by appellant "would have some effect", how can a verdict of a jury, resting solely upon the testimony of the engineer, amount to more than speculation or conjecture?

All that appellees did to establish a basis of appellant's liability was to show that appellant did in fact

discharge into the river a volume of water estimated from facts and records as amounting to a little less than six per cent over the natural stream flow (Tr. 186) and to obtain the opinion of an engineer that such additional discharge of water would have some effect.

It is felt that the illustration at page 11 of the majority opinion, wherein comment is made upon inferences available to the jury, emphasizes precisely the inferences open to the jury from the evidence before it. Since there was nothing before the jury except the fact that 6% of additional water was discharged by appellant, they were obviously left free to indulge in any one or more of the number of inferences there listed in determining what damage, if any, was caused thereby. Yet there was no evidence tending to support a choice of any one of these inferences more than any other.

It is a conceded principle of law that a party cannot recover if his evidence leaves the jury open to select at will inferences, some of which may be favorable and some unfavorable, but none of which is supported by more than sheer speculation and conjecture.

> *Atchison T. & S. F. R. Co. v. Toops,* 281 U. S. 351, 354; 74 L. ed. 896, 899 (1930):
>
> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employer's Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

As pointed out in the illustration at page 11 of the majority opinion, inferences which would result in a verdict favorable or unfavorable to appellees, depending upon the choice made, are equally available to the jury from the evidence. This being true, it was incumbent upon the jury to find for the appellant under these circumstances.

> *Pennsylvania R. Co. v. Chamberlain,* 288 U. S. 333, 339; 77 L. ed. 819, 823 (1933):
>
> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recover." (Citing cases.)

In the case at issue the facts are clear that for more than 12 hours prior to the release of impounded waters the flood had been sweeping over the light soil of the appellees' lands and continued to do so in greater volume on December 22, regardless of the release by appellant of sufficient of the impounded waters to increase the volume of the natural stream flow by a little less than 6%. In view of those destructive conditions existing prior to the time that the appellant discharged the waters for which liability was imposed, and considering further that those conditions continued naturally and with increasing force thereafter, and would have done so although appellant discharged no added volume of water, it is submitted that the less than 6% of additional amount of water so discharged by appellant

could not reasonably be considered from the evidence as a substantial cause of the damage to appellees' lands. At least, appellees' failure to produce more evidence constituted an omission of proof on a proposition vital to appellees' recovery. It was not the duty of appellant to supply such proof.

In the well reasoned case of *Montgomery Light & Water Power Co. v. Charles, et al.,* 258 Fed. 723, 731 (D. C.—Ala.—1919), which on the facts is almost identical with the present action, the court, after discussing the relatively slight amount of water discharged into the river by the negligence of the company in maintaining its dam as compared to the total volume of the flooded stream, held as a matter of law that any negligence of the company that might be complained of was insufficient to constitute proximate cause, saying:

> "If the plaintiffs in the law actions had succeeded in establishing negligence on the part of the Power Company, it would be impossible to trace the damages complained of to that negligence with any reasonable degree of certainty. In addition to the enormous volume of water flowing down the river from its upper reaches, there were contributions made to the volume by the flow of a considerable number of tributary streams below the Power Company's dam. The river itself and these streams drained an area of thousands of square miles. It would have been impossible to measure the effect of such a relatively small volume of water impounded by the flashboards on the lands of Charles and others below the Power Company's dam."

See also, *Sherwood v. St. Louis S. W. Ry. Co.,* 187 S. W. 260, 263 (Mo. App.—1916):

> "On a full consideration of this case with my associates, we have concluded and concur in holding that the flood in question was so overwhelming in character and destructive in its results that there is no substantial evidence showing that the injury to plaintiff's farm resulted as an efficient cause from the narrowness of the opening through defendant's embankment * * *."

III

If the Act of God Would Have Produced Substantially the Same Damage Irrespective of the Intervention of Negligence of Appellant, the Latter Cannot be Regarded as a Cause of the Injury.

In the illustration used in the dissenting opinion, wherein a fire caused by lightning burns 500 acres of grain and a neighbor tortiously starts a brush fire which burns with the prior fire and consumes 100 acres more, it is plain that the tortious neighbor cannot be held for the 500 acres burned prior to the inception of the tortious act, since as to such damage the neighbor's act was not the proximate cause or even any cause. But we must go further than this before fixing liability even as to the last 100 acres, for if it can be said that the damage to the last 100 acres would have occurred irrespective of the negligence of the neighbor, he is not liable therefor even though his negligence contributed to the damage.

The record of the case at bar contains not the slightest evidence relative to this proposition. Whether the torrential flood conditions would or would not have produced substantially the same amount of damage to appellees' lands, irrespective of the alleged negligence of appellant, does not appear. No opinion or evidence upon this question was asked of appellees' hydraulic engineer Roberts or given by any witness, expert or otherwise, in the course of trial. In the absence of any evidence it cannot and should not be assumed arbitrarily that, in light of existing conditions, the slight amount of additional water released by appellant produced or could produce any damage which would not under the circumstances have reasonably been expected to occur. While it is ordinarily within the province of the jury to determine such matters, there must be some evidence from which sound conclusions on this question could have been reached.

The production of evidence on the foregoing question is an essential part of appellees' case in establishing the liability of appellant. It is not a matter of defense for appellant to negative. On the state of the record, a material factor in appellees' case has been omitted and may not be supplied, in the absence of evidence, by the guess of the jury.

The reasons underlying such principle are well stated in Chief Justice Peaslee's article (supra). Damage proximately resulting from the negligence of the defendant is always an essential element to the maintenance of a cause of action for negligence. If land will inevitably be destroyed by an onrushing torrent of water

as a consequence of an act of God, no real harm or damage to such property is sustained by reason of a later negligence toward it by a third person even though such negligence may cause damage thereto.

Justice Peaslee explains this theory as follows:

> "Take away the defendant's causative act, and how much was the plaintiff's property worth? If the innocent conflagration were then bearing down upon the plaintiff's house, it is evident that it then had no value, and the defendant ought not to pay. (p. 1134.)
>
> "* * * So long as the innocent cause is in actual inescapable operation before the wrongful act becomes efficient, it is not apparent how the latter can be considered the cause of the loss. Causation is a matter of fact, and that which is not in fact causal ought not to be deemed so in law. The defendant's act may have furnished some cause for the fire, but causing a fire at that time and under those circumstances [defendant's negligence in setting a fire which joined with an already destructive fire] did not injure the plaintiff, and neither moral justification nor logic would charge the wrongdoer for damage which he had not caused." (p. 1130.)

In the exceptionally well reasoned case of *Perkins v. Vermont Hydro-Electric Corporation*, 106 Vt. 367, 380; 177 A. 631, 636 (1934), which involved an action for damage resulting from a flood of plaintiff's land through negligence of defendant in operating its dam, which concurred with an act of God in the form of unusual rain, the court observed:

> "The negligence of the defendant must, however, be an active and cooperating cause of the

damage. (Citing cases.) 'The mere existence of negligence which is not a producing cause of the injury creates no liability.' (Citing case.) It must not be 'a merely fanciful or speculative or microscopic negligence which may not have been in the least degree the cause of the injury.' (Citing cases.) *'So, if the act of God is so overwhelming as of its own force to produce the injury independently of the negligence of the defendant, the latter cannot be held responsible.'* (Citing cases.)

"The principle involved is simply that of causation. Except where there are joint tort-feasors, 'a defendant's tort cannot be considered the legal cause of plaintiff's damage, if that damage would have occurred just the same even though defendant's tort had never been committed.' Prof. Jeremiah Smith, 'Legal Cause in Actions of Tort', 25 Harv. Law Rev. 303, 312, Id. 103, 109." (Italics added.)

See also, Shearman & Redfield on Negligence (6th Ed., Vol. 1, Sec. 39, p. 77):

"But if the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury."

IV

The Principle Laid Down in the Case of Radburn v. Fir Tree Lumber Company Should Have Been Accepted by This Court as Controlling.

In conclusion, appellant feels it necessary to touch briefly on the statement in the majority opinion, appearing at the top of page 10, that "it must be borne in mind that state decisions establishing a rule of liability for

negligence are not binding on the Federal Courts." This statement is prefatory to the majority's discussion of the principle of concurring causes, laid down as the controlling principle of the case.

Appellant does not assert that in all cases the decisions of a state court are conclusively binding on Federal courts sitting within the state where the cause of action arose. It does assert, however, that in the present case the decisions of the State of Washington cannot be so lightly dismissed as the majority opinion would indicate.

Although the principle of the independent judgment of Federal courts on matters of general law has received varied application, this much seems certain—a Federal court should give full weight to a decision of the highest court of a state if there is no established principle of federal jurisprudence which is in direct conflict with the rule of that decision. If a decision of the state court is a statement of the common law of that state, then a Federal court, in forming its independent judgment, based upon the same state of facts, must turn to the same sources of general law. And unless there are weighty considerations requiring the Federal court to establish a principle of law different from that laid down by the state court, the state decision controls. As stated by the Supreme Court in the case of *Black and White Taxicab & Transfer Company v. Brown and Yellow Taxicab & Transfer Company,* 276 U. S. 518, at 530; 72 L. ed. 681, at 686 (1928):

> "As respects the rule of decision to be followed by Federal courts, distinction has always been made between statutes of a state and the decisions of its

courts on questions of general law. The applicable rule sustained by many decisions of this court is that in determining questions of general law, the Federal courts while inclining to follow the decisions of the courts of the state in which the controversy arises, are free to exercise their own independent judgment."

In the present case, appellant contends that the principle laid down in the case of *Radburn v. Fir Tree Lumber Company* (83 Wash. 643, 145 Pac. 632), is a generally accepted principle of elementary law, and that this Court, in forming its independent judgment by searching the general jurisprudence common to all of the states, must necessarily find that principle to be such. The principle of concurring causes, appellant submits, cannot have application to the present case. There is, then, no conflict between federal and state decisions with respect to the principles which are applicable to this case. It follows, therefore, that not only should this Court incline to follow that decision of the Supreme Court of the State of Washington, but it should hold, in the exercise of its independent judgment, that the principle laid down in that case is declaratory of generally accepted law.

We respectfully urge that the petition for rehearing be granted.

ROBERT E. EVANS.

LAING & GRAY,
John A. Laing,
Henry S. Gray,

Attorneys for Appellant
and Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for the appellant, the petitioner in the above entitled cause, and that in my judgment the foregoing petition for rehearing is well founded in point of law as well as in fact, and that said petition for rehearing is made in good faith and is not interposed for delay.

HENRY S. GRAY,

Of Attorneys for Appellant and Petitioner.